



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss

COMMISSION ADJUDICATORY
DOCKET NO. 723

IN THE MATTER
OF
RUVANE E. GROSSMAN

DISPOSITION AGREEMENT

The State Ethics Commission and Ruvane E. Grossman enter into this Disposition Agreement pursuant to Section 5 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On February 19, 2004, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Grossman. The Commission has concluded its inquiry and, on April 7, 2005, found reasonable cause to believe that Grossman violated G.L. c. 268A.

The Commission and Grossman now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. At the time relevant, Grossman was the founder and president of Rip Grossman & Associates, Inc. ("RGA"), a closely held consulting corporation located in Kansas. RGA specialized in business development and strategic alliances, especially in the health care and pharmaceutical fields. Grossman had extensive experience in the pharmaceutical industry, and expertise in business development and licensing.

2. RGA executed a one-year contract with the University of Massachusetts Medical School ("UMMS") calling for RGA to provide intellectual property consulting services for \$1,750/day but not to exceed \$84,000 over the period of the contract, which was from July 1, 2002 to June 30, 2003.

3. More specifically, the contract stated that Grossman would personally assist UMMS in the development and implementation of licensing plans for UMMS's technologies, and to personally handle all telephone and face-to-face contacts with designated outside companies or individuals.

4. The RGA-UMMS contract also specified the following:

No officer or employee of the Commonwealth shall participate in any decision relating to this Contract which affects his/her personal interest or the interests of any corporation, partnership, or association in which (s)he is directly or indirectly interested, as set forth in M.G.L. c. 268A. No officer or employee of the Commonwealth shall have any interest, direct or indirect, in this Contract or the proceeds thereof.

5. In February 2003, UMMS decided to license its ribonucleic acid interference (“RNAi”) technology, an important life science and therapeutic technology. UMMS decided to use Grossman to help find a marketing firm for the RNAi technology.

6. At that time, Grossman, through RGA, had a consulting contract with CytRx Corporation, a publicly traded intellectual property marketing firm located in California. CytRx was focused on the development and commercialization of high-value human therapeutics.

7. Pursuant to its contract with CytRx, RGA was entitled to \$5,000/month and a “success fee” upon the consummation of any new business that RGA brought to CytRx, plus reimbursement for other expenses. The success fee was to be at least \$150,000 per product acquired or divested.

8. RGA’s contract with CytRx also specified that RGA could not be retained to consult on any matters competitive with CytRx’s interest.

9. In or about March/April 2003, Grossman brought UMMS and CytRx together to discuss marketing UMMS’s RNAi technology. He did so both as an agent for CytRx and as a UMMS consultant.

10. During the following weeks, the parties proceeded to negotiate the terms of a licensing agreement.

11. Grossman was present at and participated in those negotiations by attending meetings, making suggestions and discussing the relevant matters. He did so both as an agent for CytRx and as a UMMS consultant. He had no decision making authority for either party and did not participate in the internal UMMS process of reviewing and approving the agreement.

12. Grossman was also privy to confidential information regarding CytRx’s negotiation strategy and development plans. On at least one occasion in March or April 2003, Grossman sent a letter to UMMS on behalf of CytRx.

13. In April 2003, UMMS signed a licensing agreement with CytRx by which CytRx would market the RNAi technology, and UMMS would receive \$200,000, 1.8 million shares of CytRx stock, royalty payments, and other beneficial commitments from CytRx.

14. In May 2003, a UMMS Deputy Chancellor learned that Grossman was simultaneously representing CytRx and UMMS regarding the RNAi licensing agreement.

15. Concerned by Grossman’s dual agency, UMMS conducted a review of its licensing agreement with CytRx. Based on that review, UMMS determined that the licensing agreement had not been harmed by Grossman’s conduct, and that it would be advantageous to leave the licensing agreement in place.

16. Nevertheless, UMMS subsequently executed Memoranda of Clarification with both CytRx and RGA. The memorandum with CytRx specified that, in the future, CytRx would have no business relationships with current or former UMMS employees without the prior written approval of UMMS.

17. The memorandum with RGA terminated RGA’s relationship with UMMS. The memorandum also required RGA to forfeit its success fee from CytRx to UMMS, which fee was later determined to be \$53,000 in cash and 100,000 shares of CytRx stock, valued at \$240,000 as of October 2003. In addition, the agreement set terms under which CytRx could employ Grossman in the future, including provisions that CytRx would ensure that Grossman would not receive any of his forfeited commission and would not have

any contact with UMMS about the licenses or participate in their interpretation. Grossman could contract with CytRx provided that he and CytRx complied with the terms of that agreement.

Conclusions of Law

18. General Laws c. 268A, § 1(q) defines a “state employee” as a person performing services for a state agency. This definition includes those who provide such services pursuant to a contract of hire or engagement, and on a part-time or consultant basis.

19. Where the consulting contract is between a state agency and a corporation, the Commission considers the following five factors in determining whether an individual within the corporation may be deemed a state employee:

- (a) Whether the individual’s services are expressly or impliedly contracted for;
- (b) The type and size of the corporation;
- (c) The degree of specialized knowledge or expertise required of the service;
- (d) The extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and
- (e) The extent to which the person has performed similar services for the public entity in the past.

EC-COI-92-6.

20. In this case, RGA was a closely held consulting corporation whose contract with UMMS specified that Grossman, the founder and president of the corporation, would personally provide the consulting services to UMMS. Grossman had extensive experience in the pharmaceutical industry, and expertise in business development and licensing. Thus, Grossman was a state employee within the meaning of G.L. c. 268A.

21. G.L. c. 268A, § 1(o) defines a “special state employee” as a state employee who is not elected and who in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.¹

22. Pursuant to RGA’s contract with UMMS, Grossman earned compensation as a UMMS consultant for less than 800 hours during the preceding three hundred and sixty-five days, which made him a special state employee.

Section 4

23. G.L. c. 268A, § 4(a) prohibits a state employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from, otherwise than in the proper discharge of his official duties, acting as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

24. The RNAi licensing agreement between UMMS and CytRx was a particular matter.

25. As a party to the agreement, UMMS, a state agency, had a direct and substantial interest in the particular matter.

26. By bringing the RNAi licensing deal to CytRx's attention, by attending and participating in the negotiations on behalf of CytRx, and by communicating with UMMS on behalf of CytRx, Grossman acted as an agent for CytRx, someone other than the state, in relation to the RNAi licensing particular matter. This conduct was not performed in the proper discharge of Grossman's official duties as a UMMS consultant.

27. RGA had a contract with CytRx pursuant to which it would receive compensation for bringing the RNAi deal to CytRx, and for assisting CytRx in developing its negotiation and marketing strategy for the new technology. Thus, Grossman requested compensation from CytRx, someone other than the state, in relation to the RNAi licensing particular matter. This arrangement was not provided by law for the proper discharge of Grossman's official duties as a UMMS consultant.

28. Sections 4(a) and 4(c) do not apply to special state employees unless, among other things, the special state employee has at any time participated in or had official responsibility for the particular matter as a state employee.

29. As the RGA-UMMS contract called for Grossman to assist UMMS in the development and implementation of licensing plans for UMMS's technologies, Grossman had official responsibility for the particular matter. In addition, Grossman participated in the particular matter as a state employee when he brought CytRx and UMMS together to negotiate the RNAi licensing agreement, and when he attended and contributed to the negotiation meetings.

30. Thus, by acting as agent for and requesting compensation from CytRx in relation to the RNAi licensing deal while having official responsibility for and participating in the matter as a UMMS consultant as described above, Grossman violated § 4(a) and (c) on several occasions.

Section 6

31. G.L. c. 268A, § 6 prohibits a state employee from participating in a particular matter in which, to his knowledge, he has a financial interest.

32. As noted above, Grossman participated as a state employee in the RNAi licensing particular matter by attending and contributing to the negotiations as a UMMS consultant.

33. When he so participated, Grossman knew that he had a financial interest in the matter because his consulting contract with CytRx called for him to receive compensation for his work regarding the RNAi matter, and a success fee based on the outcome of the deal.

34. Thus, by participating in the RNAi licensing particular matter when he knew that he had a financial interest in the matter, Grossman violated § 6 on several occasions.

Resolution

In view of the foregoing violations of G.L. c. 268A by Grossman,² the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Grossman:

- (1) that Grossman pay to the Commission the sum of \$10,000 as a civil penalty for violating the above-mentioned sections of G.L. c. 268A;
- (2) that Grossman complies with the Memorandum of Clarification between RGA and UMMS; and
- (3) that Grossman waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: June 9, 2005

¹ Section 1(o) further provides, "For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation."

² There is evidence that the UMMS Executive Director of the Office of Technology Management—who had signed RGA's consulting contract with UMMS—was aware that Grossman also had a contractual arrangement with CytRx, and was aware that Grossman was acting on behalf of both parties in attempting to facilitate the licensing agreement.

Nevertheless, the Commission does not find the executive director's knowledge mitigating. Grossman's conduct in being a double agent violates the conflict-of-interest law. When other UMMS officials learned of and reviewed the situation, UMMS decided to terminate the executive director because he had shown bad judgment in allowing Grossman to serve both sides of the table. Moreover, for § 6 purposes, a hiring official's knowledge of a conflict is not enough. Section 6 requires that a public employee's appointing authority make a written determination regarding the propriety of the employee's participation. In this case, the executive director may have known of the situation, but he did not make a written determination allowing Grossman to participate on behalf of UMMS. It was Grossman's responsibility to see that this procedure was followed by filing a written disclosure with the executive director that would have commenced a formal, written determination process. See *In re Hanlon*, 1986 SEC 253 (strict compliance with the written disclosure and authorization provisions of § 6 ensure that all due consideration is given to issues that may be controversial or have the potential for abuse; ultimately, the primary responsibility for compliance rests on the public employee seeking the exemption). As to the § 4 violation, the executive director had no authority to permit the dual agency in direct contravention of the conflict-of-interest law.